United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

75-1393

To be argued by
JOSEPH B. EHRLICH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1393

UNITED STATES OF AMERICA,
Appellee,

—against—

JOE TRUMAN BOYD, ET AL.,
Defendants,

ERNEST R. MULLENAX,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT ERNEST R. MULLENAX

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JOE TRUMAN BOYD, ET AL.,

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ERNEST R. MULLENAX,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT ERNEST R. MULLENAX

PRELIMINARY STATEMENT

Ernest R. Mullenax appeals from a judgment of conviction entered against him on December 2, 1975, after a jury trial before Honorable Milton Pollack, in the United States District Court for the Southern District of New York.

Appellant, by an indictment filed February 10, 1975, was charged with direct violation of 18 U.S.C. §§1001,

1341 and 1343 and 15 U.S.C. §§77e, 77q and 77x and with conspiracy to commit the aforesaid offenses.

He was convicted of all charges except the substantive offenses under 18 U.S.C. §1001. On December 2, 1975, a two-year sentence with all except six months suspended was imposed on each count to run concurrently: the term of imprisonment to be served by appellant under 18 U.S.C. §3561. Additionally, a two-year period of probation and a ten thousand dollar fine with respect to the conspiracy count were imposed. Appellant was admitted to bail, and his fine stayed, pending appeal.

ISSUES PRESENTED FOR REVIEW

1. When the jury, two hours after retiring to deliberate, sent a note to the trial court requesting the substantive statutes with which the defendants were criminally charged, did the trial court err and deny the defendant-appellant a fair trial in complying with the literal request of the jurors and not reinstructing the jurors as to the requisite and critical elements of knowledge, wilfullness and intent, which elements were not embodied in the language of the statutes submitted?

2. Was there an intrusion into the jury room and function, and was the defendant-appellant denied a fair trial, when the trial court, after the jury requested and received all Government exhibits, submitted to the jurors, pursuant to their request, a list which arbitrarily set forth which trial exhibits determinatively applied to enumerated counts of the indictment?

3(a). Did the trial court err and deny the defendant-appellant a fair trial, when it received in evidence, and thereafter failed to strike from the evidence, a $9,000 check, Government's exhibit 296-A, which the record of the trial unequivocally evidenced was totally remote and irrelevant to the allegations set forth by the indictment against the defendant-appellant in terms of his use of Select stock?

3(b). Should the trial court have granted certain requests to charge of the defendant-appellant which sought to have the theory of his defense fairly reflected and to have the legal import of the $9,000 check, which check was heavily relied upon by the prosecution to implicate the defendant-appellant in the criminal allegations, clarified to the jury, and did the failure of the trial court to

charge as requested deny the defendant-appellant a fair trial?

4(a). Inasmuch as the uses of Select stock by the defendant-appellant at two banks and a business trust, with reference to loan related transactions, were the only acts which connected him to the onus of the prosecution, should his conviction be reversed and the indictment against him be dismissed on the ground that the uses of Select stock by the defendant-appellant were not acts or transactions within the scope or purview of the federal securities laws?

4(b). Did the trial court commit reversible error in charging the jury, under the circumstances of the case with reference to the defendant-appellant, that the use of stock as collateral for a loan or its use to provide additional security for a loan, was a use within the purview of the securities laws?

5(a). Was defendant-appellant's inclusion in the indictment constitutionally infirm on the basis that the indictment against him cannot be solely predicated on the proposition that he, without anything more, used Select stock at banks as collateral for loans and that such fact alone is not rationally persuasive of the crimes charged against him

or could not provide a basis, within the framework of our system of legal jurisprudence, for the indictment against him?

5(b). Was the court below in error in failing to afford defendant-appellant hearings as were mandated by the Supreme Court of the United States in Kastigar v. United States, 406 U.S. 441 (1972).

6. Did the prosecution fail to meet its burden of proof in that the evidence did not establish the guilt of the defendant-appellant beyond a reasonable doubt?

STATEMENT OF THE CASE

INTRODUCTION

Forty witnesses were called by the prosecution over the course of the three-week trial. Only five witnesses (Chapel, Joiner, Nichols, Mann and Collins) testified directly with respect to the alleged involvement of the appellant in the prosecution.

The record is barren of direct testimony and documentary evidence implicating appellant in the vast realm of allegations of criminal activity in the indictment. The prosecution at trial contended that the appellant was

involved in the alleged criminal enterprise because of alleged paybacks of monies, borrowed by the appellant with the indirect use of Select stock, to Boyd and Joiner (A.238)*, whom the prosecution claimed were the promoters of the enterprise (A.222-223). As will be discussed, infra, the prosecution's contention was frivolous, particularly in that the record at trial hardly could be supportive of its contention.

Appellant is on the periphery of the allegations. In substance, the bulk of the testimony of the forty witnesses called by the prosecution related to the following allegations, covering a period from in or about January, 1970, to April 12, 1970, which in no manner directly touched or were connected with the appellant:

(1) A dormant Nevada corporation by the name of Goldfield Candelaria was purchased.

(2) Its name was changed to Select Enterprises, Inc.

(3) Assets of questionable value were acquired and placed into it.

(4) A certified financial statement of the corporation was prepared, which was false, fraudulent and misleading in that it reflected an untrue value of Select.

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* References are to appellant's appendix filed in this Court with respect to the instant appeal.

(5) An artificial market in the stock of Select was created and the stock manipulated to reflect an untrue value.

(6) False, fraudulent and misleading news releases and brochures of the corporation were prepared for distribution.

(7) The Securities and Exchange Commission suspended trading in the stock and after false, fraudulent and otherwise perjurious statements were made, and backdated documents submitted to the Securities and Exchange Commission, trading in the stock was permitted to resume.

There is not one scintilla of evidence that the appellant had any connection with the wide range of events occurring until the trading in Select stock was permitted to resume on or about April 12, 1970. In fact, the record at trial (A.555) evidences that appellant on May 1, 1970, at the earliest, entered into the course of events. His involvement in the case stemmed from the uncontested fact that he received on May 8, 1970, a $60,000 loan from the State National Bank of Alabama and on July 1, 1970, a $25,000 loan fron the Town & Country Business Trust. The medium connecting these otherwise innocent transactions to the onus of the prosecution is the fact that Select stock was indirectly utilized with reference to the aforesaid transactions (A.583-584, 596, 681). Interestingly, the Select stock employed by the appellant in connection with the

borrowing from the Town & Country Business Trust was not in any sense utilized or received by the business trust as the primary collateral for the loan to appellant. Forty thousand shares of Pig 'N Whistle stock was used by appellant and was considered by the business trust to adequately cover the loan (A.623-624)*.

In any event, the record evidences and appellant contended that he had no knowledge of any wrongdoings and did not use the Select stock with the specific intent to defraud. The prosecution contended that appellant passed approximately half the $85,000 borrowed to the criminal enterprise as part of the scheme (A.238, 798-801, 831-832) and because of such contention was criminally implicated in the accusations.

The record reveals that the appellant, on borrowing the aforesaid sums, was personally obligated to repay the loans, irrespective of the use of stock, Select or any other, as collateral (A.583-584, 596, 681). The obligation for repayment of the loans stood independent, free, separate and apart from the use of stock for collateral of the loan. Consequently, if appellant passed half the proceeds into the

* The Pig 'N Whistle stock and the use thereof by the appellant are not within the realm or scope of the allegations or charges contained in the indictment.

criminal enterprise, he did so to his own detriment because he is still today legally liable for every cent borrowed with interest to date (A.583-584, 596, 681).

The last transaction central to appellant's alleged involvement in the prosecution is connected with the use of Select stock at the Home State Bank. A loan was obtained by appellant at the bank in 1968*, a period not within the scope of the indictment and a transaction not directly in issue, and on May 9, 1970, appellant gratuitously (A.581), without any legal obligation, utilized Select stock as additional collateral for the loan at the very time he made a $1,000 payment on account.**

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* The appellant had several large loans outstanding at banks prior to any use of Select stock with reference to his loan transactions at the State National Bank of Alabama in May, 1970. He had an excellent credit rating (A.675, 677). In fact, the loan at the Home State Bank was renewed by Nichols in January, 1969 (A.581).

** Since the prosecution claimed that the use of Select stock at the Home State Bank was part and parcel of the alleged illegal use of Select stock by appellant in the course of the claimed criminal enterprise, the almost $45,000 due at the Home State Bank added to the $85,000 obtained by appellant from the State National Bank of Alabama and Town and Country Business Trust, results in a total figure of $130,000. Consequently, well less than one-half the claimed benefit went to Boyd and Joiner, and as will be seen, infra, none to Boyd, and less than ten per cent of appellant's claimed benefit of use of the stock, to Joiner, and the record clearly shows that part of that money in issue was without appellant's knowledge and the other portion without any connection, legal or otherwise, to the use of Select stock by the appellant. See

Inasmuch as the record was naked of direct proof that appellant had knowledge of any wrongdoing or had specific intent to defraud; particularly, in view of the evidence that appellant personally owes every cent of the loan balances with interest to date, the prosecution was only left with recourse to the existence of a $4,000 check to Chapel, a $9,000 check to Joiner, and the payment of a $25,480 indebtedness of a third party having no connection with this indictment, as the bases for appellant's implication in the alleged scheme.

THE PROSECUTION'S CASE - PAYBACKS*

William C. Chapel, after receiving immunity from prosecution for admittedly perjurious statements made under

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pps. 10-16.

* The prosecution also showed that Select's financial statement with the Select corporate brochure and news release were given by the appellant with the names of dealers and brokers in the stock to the State National Bank of Alabama and in part to the Home State Bank, the latter bank where Select stock was used only as additional collateral for an outstanding loan; however, the only means and manner the prosecution could attempt to show the appellant knew the aforesaid documents were false, fraudulent and misleading was by arguing that appellant paid back half the loan proceeds obtained into the criminal enterprise. The only document given to Town & Country Business Trust was appellant's personal financial statement which listed Select stock at $12; however, again, the prosecution was commanded to argue that because of "paybacks" appellant purportedly knew the value of Select was less than he represented (See A.593, 1115-1116).

oath prior to trial, including his grand jury testimony*, testified with respect to the $4,000 check he received from appellant.

His testimony at trial, manifestly truthful, gave no support to the prosecution's case against the appellant. Chapel testified at trial that more than five years earlier, on or about May 18, 1970 (A.422), Boyd** told appellant to give Chapel, appellant's friend of nearly eighteen years (A.416), $4,000 after Chapel expressed to them his desperate financial position.

Appellant subsequently gave Chapel a check written to his order in the sum of $4,000, which upon receipt Chapel forwarded $3,000 to his account at a Texas bank, and soon thereafter delivered $1,000 to Joiner.

The record clearly shows that appellant had no knowledge whatever that $1,000 of the money given by him to Chapel, due to his desperate financial condition, eventually was transferred by Chapel to Joiner (A.421):

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* In fact, Chapel was the only witness testifying with respect to the appellant at the course of the grand jury proceedings. His testimony can be found at A.200 and in Point V, infra.

** Chapel testified that at that time Select was interested in an insurance company with which appellant and a Donald Rouse were connected (A.423).

"Q. When Dr. Mullenax wrote the check out for you in the amount of $4,000, did you tell him what use you were going to make of those funds?

A. My recollection is that I did not. I can't be certain, other than to take care of my own financial problems, of course, which was pretty obvious."

James Calvin Joiner, who the prosecution contended was the chief promoter of the criminal enterprise with Boyd, testified with respect to the $9,000 check. As with Chapel, his testimony with regard to the $9,000 check gives no support to the prosecution's contention against Mullenax.

Joiner testified that in the latter part of June, 1970, he and "everybody was broke (A.504)" and that he, through unnamed co-conspirator, Sam Hale*, arranged to grant appellant the use of forty thousand shares of Pig 'N Whistle stock for a loan which appellant indicated to them he could obtain for himself in Kansas.** Joiner received a check in

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* Mr. Hale was named as a co-conspirator only in the Government's supplemental bill of particulars (A.100); he was not recognized as such in the indictment.

** As stated, supra, appellant required, and had a number of outstanding loans, and enjoyed an excellent credit rating. Appellant in July, 1970, was in need of additional funds. He had connected himself with Donald Rouse and the Continental General Life Insurance Company, see infra, page 14, and

July, 1970, from appellant in the sum of $9,000 which unequivocally, from Joiner's testimony, was with regard to obtaining this Pig 'N Whistle stock for appellant*. There was no legal or other connection between the $9,000 check to Joiner and Select Enterprises, Inc. and/or its stock.**

The third witness, Bill Collins, was a loan officer at the State National Bank of Alabama at the time he granted appellant his loan application. Admittedly, he was the banker for the Continental General Life Insurance Company, in which Select was interested, and its affiliated companies for which companies Rouse was the Chairman of the Board (A.663). Collins serviced all the loans for the said corporations and for Rouse individually (A.663).

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in late April and early May, 1970, was expecting the required funding for the insurance company to obtain its charter (A.588-591, 1114). By May 9, 1970, the funding did not come through and he told Richard A. Nichols, president of the Home State Bank, that he could not repay the entire indebtedness as he told Nichols he would when the expected funding came through (A.590). Bill Collins, the loan officer at the State National Bank of Alabama, testified that the insurance company was never able to acquire its charter and ceased operations (A.682). In any event, by July, 1970, appellant was in need of additional funds.

* See Point III, infra.

** Select stock was obtained by Rouse and appellant some two months earlier, anywhere between May 1, 1970, and May 7, 1970, from Boyd and Joiner, after it was established,

Collins had been aware well before May 8, 1970, that Rouse strongly desired Mullenax, who had been successful in the insurance industry, to join him at Continental (A.665, 670). The main problem Continental had at the time was that it required sufficient funds to obtain its charter; alternatively, it had to sell sufficient stock to obtain the necessary funding. Appellant was desired by Rouse to assist in these regards, and also the successful operations of the company (A.588, 665, 670, 1114).

Collins readily, in one day, May 8, 1970 (A.677, 680), granted the $60,000 loan to the appellant.* It was with interest at eight per cent per annum, and as part of the consideration in granting the loan to appellant, Collins required him to pay off the entire amount of the

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according to Joiner's testimony (A.498), that "Rouse had some kind of insurance company that he was interested in, either getting some stock for or making some acquisition for". The last of the four certificates, each in the amount of ten thousand shares, was used by appellant with reference to the Town & Country Business Trust. Only two thousand shares of Select were initially utilized with reference to the loan, and were added to the primary collateral of forty thousand shares of Pig 'N Whistle, admittedly worth between sixty and eighty thousand dollars (A.624), to which forty thousand shares the $9,000 received by Joiner was with reference.

* On May 18, 1970, Collins granted appellant a $5,000 loan, and did not request or require from the appellant any collateral therefor (A.676, 1080).

outstanding indebtedness of Ray Lewis* to the bank (A.670). Collins shrewdly manipulated the grant of the loan to both his and the bank's benefit.

Lewis was in default on his loan at the time (A.677-678), and the bank, in granting appellant the loan, had Lewis's loan paid off in full (A.654, 670). Furthermore, the bank effectively was giving appellant only $35,000 and receiving eight per cent interest per annum on a principal of $60,000, meaning an effective interest rate to appellant of nearly sixteen per cent.

The prosecution argued that the $25,480 was a payback and the best proof it could muster at trial was that Rouse was an endorser on Lewis's note, then overdue to the bank. Rouse by no means or manner was a central or pivotal figure in the allegations in issue at the trial or in the alleged criminal scheme to warrant the benefit of the $25,480 claimed payback**, and it is significantly emphasized

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* Ray Lewis was the president of the Continental General Life Insurance Company, and had an outstanding indebtedness to the State National Bank of Alabama in the amount of $25,480 (A.654).

** If anyone, it was to the overall benefit of the bank and Collins, who required the payment of the note by the appellant as a condition for the grant of the loan (A.652-653, 670).

that he was not called by the prosecution as a witness against the appellant.*

Consequently, on a record fraught with inconsistency, the prosecution sought defendant's criminal connection with the charges set forth in the indictment when the inferences were not consistent with defendant's guilt, or that he had the requisite criminal knowledge and specific intent to defraud in the vast scheme of allegations on which appellant appeared on the very periphery.

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* Collins had previously testified with respect to Rouse, the insurance operation and appellant as follows (A.681-682):

"Q Have you ever asked Mr. Rouse, whom you had known for at least two years, as to how he could have allowed you to be put in this position?
A I sure have.
Q And what has he said to you?
A He said that it was something that was unforeseen, that he had no right to suspect the hardship that they had had.

***

Q Had you advised your legal counsel that Don Rouse had told you that the State National Bank would not lost any money on Dr. Mullenax's debt?
A Yes. I had told him, my counsel, that, but I don't know how Mr. Rouse thinks I will come out, but he did make that statement. I hope it's true".

ARGUMENT

POINT I

THE FAILURE OF THE TRIAL JUDGE TO REINSTRUCT THE JURY ON ISSUES OF KNOWLEDGE, WILFULLNESS AND INTENT WAS REVERSIBLE ERROR.

Two hours after retiring to deliberate, the jury sent a note to the court which requested the statutes with which the defendants at trial were criminally charged.*

The trial judge complied with the literal request of the jurors** over objection of appellant's trial counsel (A.921), who submitted that the statutes did not cover the requisite and critical elements of knowledge, wilfullness and intent. Consequently, the transmission of the statutes without more was prejudical to the defendant. It was contended (A921) that the submission of the statutes had to be put in the context of the court's charge which did cover and instruct the jury as to the material and crucial elements of knowledge, wilfullness and intent. The failure of the trial court to do so, without question, denied the appellant

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* The note was marked court's exhibit 55, and read in full as follows: "Could we have Sections 1001, 1341, and 1343 of Title 18 United States Code + Sections 77e, 77q and 77x of Title 15 United States Code. Felix Verguilla."

** The trial judge in his discretion, however, did not submit 15 U.S.C. §77x, the penalty section.

a fair trial. The requisite and critical elements of knowledge, wilfullness and intent applied to each and every count contained in the indictment (A.889-890).

In United States v. Bland, 299 F. 2d 105 (5th Cir., 1962), the United States Court of Appeals was faced with a situation similar to the one presented herein to this Court. After retiring to deliberate, the jury in Bland requested the trial judge to repeat the reading of the statute, which did not itself cover all the requisite elements of the offense. The trial judge, during the course of his charge to the jury, previously had charged the requisite elements of the offense.

The trial judge in Bland, as the trial judge in the case herein, complied with the request literally, but failed to repeat to the jury all the requisite elements involved for the jury's consideration and determination.*

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* The court in Bland stated, 299 F. 2d, at 108:
"In his original charge the District Judge had correctly taken the position that guilty knowledge was a material element of the offense, since the indictment charged it, and for the further reason that the statute would be unconstitutional if construed so as to permit a finding of guilt without such knowledge. But upon the request for further charges he failed and refused to remind the jury of this requisite matter of proof, upon the stated ground that the statute was all that the jury had requested to hear (Cf. A.923, 963)."

The United States Court of Appeals reversed the convictions because it found the failure of the trial judge to do more than re-read the statute involved prejudiced the appellant. The court in Bland poignantly and significantly set forth the following in its knowledgeable and learned decision:

> "Failure to do more than re-read the Statute involved in this case was prejudicial to the rights of the appellants.
>
> "Appellants' counsel made timely objection to the failure of the trial judge to bring to the jury's attention all the elements required to be proved to establish guilt as set out by him in his earlier complete instructions. This is to say, objection was made to the omission of repeated instructions requiring proof of knowledge and intent as necessary ingredients of the charged offense. These objections were voiced as soon as the jury left the courtroom and the point is properly preserved in the records for our consideration.
>
> * * *
>
> "It would strain credulity to suppose that the original instructions of four hours earlier, explaining the statutory elements of guilt, and adding the additional requisites of knowledge and intent, were still fresh in the minds of twelve lay jurors. If their minds needed refreshing as to the terms of the statute, it is an inference so strong as to be conclusive, that the further instructions, explaining that knowledge must be proved, and raising the sole factual issue still in doubt under the evidence, had also by then completely gotten out of the minds of the jurors. The defendants were effectively stripped of their sole defense and conviction became a foregone conclusion (emphasis supplied; 299 F. 2d at 108, 109)."

This principle was recently reaffirmed by the United States Court of Appeals for the Fifth Circuit in United States v. Boerner, 508 F. 2d 1064 (1975); Cf. United States v. Bolden, 514 F. 2d 1301, 1309 (D.C. Cir., 1975); United States v. Harris, 388 F. 2d 373, 377 (7th Cir., 1967).

At trial, the prosecution's main contention was that the appellant employed stock of Select Enterprises, Inc. with criminal knowledge and specific intent to defraud, when he placed such stock as collateral for loans from a bank and business trust and as additional collateral for an outstanding loan at a second bank. The sole defense of the appellant was that he did not have knowledge that the stock used was less than its represented value and that he did not have either the criminal intent or specific intent to commit the offenses with which he had been charged.

The jury in its deliberations realistically could have looked at and relied upon the written statutes as containing all the essential elements and failed to consider the essential elements of requisite knowledge and intent, the bases of appellant's defense, to his clear and certain detriment. The court's charge covered fifty-three counts,

involving several complex statutes, and the jury was in the position of considering eleven defendants with regard to each and every count and in terms of the separate charges. The fundamental determination was whether the prosecution had proven each of the several elements of each count and of each offense beyond a reasonable doubt. As the court stated in Bland, "it is an inference so strong as to be conclusive" that the jurors, faced with a maze of determinations with regard to the numerous charges and offenses, required refreshing as to the terms of the statutes -- the elements of the offenses -- and it is unequivocal that the jurors should have been reinstructed with regard to the critical and crucial elements of knowledge, wilfullness and intent. The failure of the trial judge to do so was to appellant's clear and certain detriment.

For instance*, to the layman, the gist of Title 15 United States Code §77q is that appellant would be guilty of a criminal offense of the securities laws if he obtained, with the use of Select stock, money or property by means of any untrue statement or representation of a material fact.

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* The requisite elements, as stated, apply to all counts and charges contained in the indictment (A.889-890).

The evidence at trial was that well prior to May, 1970, the time of appellant's entry into the course of events, certain co-defendants caused to be prepared an allegedly false financial statement for Select, brochures, and other documentation allegedly not reflecting truly the worth of Select Enterprises, Inc. (A.283, 302, 304).

It was not contested that such materials were given by the appellant to the two banks with reference to his use of Select stock as collateral; however, it was contended that any use of said materials was not with requisite knowledge and intent (A.813-817).

The jury, relying on the language of the statute, erroneously, mistakenly and improperly would find the defendant-appellant guilty of the central question of the prosecution -- securities fraud -- if it found without more that appellant obtained money by means of the use of Select corporate materials, not prepared by him -- if the jury believed the said materials to be false and misleading. Consequently, it is unequivocal that reliance by the jury on the wording of the statute, which it had before its eyes, would strip appellant of his defense and any proper consideration thereof, and would necessarily place

him in the minds of the jurors as one guilty of the central criminal offense (fraud), a member of the conspiracy, and one otherwise implicated in the alleged wrongdoings.

POINT II

THE TRIAL JUDGE IN SUBMITTING TO THE JURY A LIST SETTING FORTH WHICH EXHIBITS CONCLUSIVELY APPLIED TO ENUMERATED COUNTS OF THE INDICTMENT, EFFECTIVELY DENIED APPELLANT A FAIR TRIAL.

At the time a jury retires to deliberate to reach the critical determination of the guilt or innocence of an accused, the jury room must be kept free of all extraneous matters not received or admitted in evidence at the course of the trial. Without doubt, jurors may make requests with reference to the evidence, and the court in its learned discretion may accede to all proper and reasonable requests with reference to the testimony, the documentation and other evidence received and admitted at the trial of the case. However, it is clearly recognized that:

> "When twelve jurors sit down to deliberate upon their solemn duty of pronouncing innocence or guilt upon a fellow human, each exposes his own particular views of the evidence to the sound judgment of all with the result that tangential views have little chance of survival and practically none of getting eleven approving votes (Cavness v. United States, 187 F. 2d 719 (9th Cir., 1951; emphasis supplied)."

The trial judge in the court's charge to the jury stated in pertinent part, in this regard, as follows (A.844-845):

> "I shall now give you your final instructions, which will guide your deliberations. Briefly, as you have been told, the defendants on trial have been charged by the Government with criminal offenses. It is your recollection of the facts that counts here and not the recollection of counsel and not my recollection. It is for you to determine the weight that will be given to the evidence, the credibility that you will extend to the witnesses who testified and the reasonable inferences that are to be drawn from the evidence that has been received.
>
> * * *
>
> "It is my province to instruct you as to the legal principles that are to be followed in the case and it is your duty to accept those instructions as they are given to you by me. On the other hand, it is your exclusive function to determine the facts on the basis of your consideration of the evidence and then, applying the instructions as to the law that I am about to give you, to decide whether or not the defendant on trial before you is guilty of the charges against that defendant or not guilty.
>
> "You are the sole and exclusive judges of the facts. Your decision as to the fact is final and conclusive."

The trial judge failed to follow the import of the well founded legal principles enunciated in his charge to the jury. On the day the jury retired to deliberate, the jury sent the court a note requesting all government exhibits*, which exhibits were subsequently forwarded into

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* The note was marked court's exhibit 57 (A.925) and read: "Please send government exhibits." The time noted on the record was 2:40 P.M.

the jury room. On October 18, 1975, at 11:05 A.M., the jury sent the court two notes, the first (court's exhibit 62) which read: "Could we have the exhibit #'s of counts 2-28, 29-40, and 41-51. Felix Verguilla."

With respect to counts two through twenty-eight, there were no exhibits having substantive reference to the appellant (A.2622); however, counts thirty-eight, thirty-nine, forty, forty-nine, fifty and fifty-one, centrally related to the transactions in issue in which appellant employed Select stock at the two banks and business trust. Appellant's counsel consequently objected (A.963-966) to the submission of a list the prosecution prepared, which asserted particular enumerated exhibits applied with respect to certain counts. Moreover, he refused to take part in any colloquy, discussion or agreement with the prosecution consenting to the submission of any list (A.965-966).

Counsel's objection in substance was that the jury was told repeatedly, consistent with the mandate of the law, that the jurors were the sole triers of the fact and that the jury must determine what evidence, if any, applies to each defendant* and to each count. It was contended that the

* The jury previously requested a list of exhibits which applied to certain defendants (A.933). The submission of such lists were objected to (A.935) and the objection was deemed made by all counsel (A.936).

submission of any list was nothing less than an intrusion into the jury room and an address as to matters then solely within the determination of that body.

Without the slightest scintilla of doubt, the submission of court's exhibit 62 was nothing less than an intrusion into the jury function and into the jury room. The list originally prepared by the prosecution was submitted, after modifications, to the jury by the court pursuant to a note addressed to the court, and consequently authoritatively established that the listed exhibits unequivocally and exclusively applied to the particular count of the indictment. The interpretation, evidenced by court's exhibit 62, was not a matter or fact properly in evidence, and unequivocally was an injection of interpretation at the most critical portion of the proceedings, and resultantly an unwarranted intrusion into the jury room.

There is no right more sacred than the right to a fair trial, and no wrong more grievous than its negation.* In this regard, it is highlighted that court's exhibit 62 did

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* See Stone v. United States, 113 F. 2d 70, 77 (6th Cir., 1940).

not contain any defendant exhibits.*

In addition to the determination made by court's exhibit 62, the entries are nothing less than an arbitrary and capricious selection of exhibits**. Which evidence applied to a defendant or to a specific count was in the sole province of the jury, and such determination by either judges or lawyers is unequivocally an intrusion into the jury function and responsibility.

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* Defendant Mullenax's exhibits F, G, H and I were received in evidence. See A.1113-1116.

** Compare the items listed on court's exhibit 62 with reference to counts thirty-eight and forty-nine. In addition to the discrepancy between the exhibits listed, exhibits 305, 309 and 386, all made reference to during the course of Collin's examination and received in evidence at that time, are not listed nor are they at all mentioned with regard to counts thirty-eight through forty or forty-nine through fifty-one - or in fact anywhere in court's exhibit 62. Moreover, none of defendant Mullenax's exhibits are included or referred to with respect to the aforesaid counts. The determination of these counts, particularly counts thirty-eight through forty, were crucial to the jury's determination of appellant's involvement with regard to the alleged criminal activity.

Also noted is the manner the exhibits listed are expressed. For instance, in count thirty-eight, exhibit 120 is separated from the otherwise inclusive unit 121-123. Such unnecessary emphasis and highlighting was inconsistent with constitutional provisions of impartiality mandated at such a critical point of the proceedings (see A.1018-1019).

The United States Court of Appeals for the Fifth Circuit warmly regarded certain language of Judge Friendly in United States ex rel Owen v. McMann*, and stated in United States v. Howard, 506 F. 2d 865, 867 (1975):

> "...Rather, we follow the scholarly opinion of Judge Friendly on this matter in United States ex rel Owen v. McMann, supra, a case closely paralleling this....The modern jurors' 'verdict must be based upon the evidence developed at trial'. Irvin v. Dowd, 1961, 366 U.S. 717, 722, 81 C. Ct. 1639, 1642, 6 L. Ed. 2d 751, 755. It is of course 'the very stuff of the jury system' for the jury to exercise its collective wisdom and experience in dissecting the evidence properly before it; and in this process the cross-pollination of opinion, viewpoint and insight into human affairs is one of the jury's strengths (emphasis added)."

The jury is legally considered and conceived as an institution that determines the merits of a case "under circumstances assuring the accused all the safeguards of a fair trial". See United States v. Howard, supra; Farese v. United States, 428 F. 2d 178 (5th Cir., 1970). Resultantly, the submission of court's exhibit 62 to the jury was nothing less than a further address to the jury after the "iron curtain descend(ed) upon the jury room", United States v. Howard, supra, 506 F. 2d at 866, under the umbrella of the authority of the court, and denied the appellant a fair trial.

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* 435 F. 2d 813 (2d Cir., 1970), cert. denied, 91 S. Ct. 1373.

POINT III

THE RECEPTION OF GOVERNMENT'S EXHIBIT 296-A IN EVIDENCE AND THE TRIAL COURT'S FAILURE TO STRIKE THE EXHIBIT FROM EVIDENCE DENIED THE APPELLANT A FAIR TRIAL.

THE TRIAL COURT SHOULD HAVE CHARGED THE JURY WITH REFERENCE TO CERTAIN SUPPLEMENTAL REQUESTS TO CHARGE WHICH WOULD HAVE CLARIFIED TO THE JURY THE TRUE EXTENT OF THE IMPORT OF THE EXHIBIT AND FAIRLY REFLECTED THE THEORY OF THE DEFENSE CASE.

The prosecution primarily relied on a $9,000 check drawn on the account of the appellant and his wife to the order of J. J. Joiner, Government's exhibit 296-A, to involve the appellant in the alleged criminal wrongdoings. It is submitted that the trial court was without sufficient foundation to receive the $9,000 check in evidence.

The exhibit first appeared at the time of the Government's examination of William Chapel (A.325-326). Chapel testified that he did not know the purpose of the check (A.426) and was acting solely as a courier (A.426) when he took the check at the behest of Boyd and Joiner to Wichita, Kansas, for conversion into a cashier's check which was subsequently taken by him to Dallas, Texas, and given to Boyd and Joiner (A.325-327).

Appellant's counsel made repeated objections to

the prosecution's offer of the check into evidence (A.326, 328) and asserted that the exhibit was irrelevant and without proper foundation. The exhibit was not received at that time by the trial court. Consequently, appellant's counsel immediately moved to strike all of Chapel's testimony with regard to the $9,000 check (A.329). The motion was denied by the trial court (A.329).

Government's exhibit 296-A next appeared at the direct examination of the witness Joiner. Joiner testified as follows with regard to the check at the course of his direct examination by the prosecution (A.504):

> "Mr. Rouse and Mr. Mullenax come back into Dallas at the Ramada Inn and I talked to Mr. Mullenax and he said that he had some people in Wichita, Kansas that he could borrow some money on if he had some stock, and it had to be quoted stock. I was broke and everybody was broke, and I needed some money so I got some stock off another fella by the name of Pig and Whistle and I gave it to Mr. Mullenax and him and Mr. Hale went to Wichita, Kansas and sent me back a check for $9,000 (emphasis supplied). I, in turn, gave it back to Mr. Chapel and Mr. Chapel and Mr. Mullenax went back to Wichita, Kansas and Mr. Chapel brought me back a cashier's check for $9,000."

Aside from the inconsistency of the testimony given by Joiner with that of Chapel in terms of the conversion of Government's exhibit 296-A into a cashier's check

(cf. A.327)*, Joiner's testimony on direct examination cannot support any interpretation other than the $9,000 check was given in terms of the grant of Pig 'N Whistle stock.** Consequently, Government's exhibit 296-A had no place in the jury's determination of appellant's purported criminal involvement in the alleged criminal scheme. The record without question does not support any interpretation or construction that the $9,000 was in any legally sufficient way connected with the use of Select stock by the appellant. Again it is reiterated that Pig 'N Whistle stock, which was used by the appellant at the Town and Country Business Trust and received by the business trust as the primary collateral for the loan obtained, was not within the realm or scope of the allegations or charges contained in the indictment.

The prosecution again offered exhibit 296-A for reception in evidence (A.505). Appellant's counsel again objected to its admission (A.505) on the basis of relevancy inasmuch as the record did not support any connection with Select Enterprises, Inc. in terms of the allegations and

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* It is also noted in terms of the variance, that appellant was not the drawer of the check (A.325-326).

** Also see A.534-535.

charges set forth by the indictment.* The court summarily overruled the objection, and the check was received (A.505).

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* A communication sent to the court at the close of Chapel's testimony sets forth the basis of counsel's objection to the admissability of the check. The motion which was marked court's exhibit 11 (A.344) was as follows:

> "The defendant Ernest R. Mullenax respectfully moves this court that all testimony given by the prosecution witness William C. Chapel with reference to the defendant Ernest R. Mullenax be stricken from the record with appropriate instructions, and that Government exhibits 294-A, 295 and 296-A also be stricken from the record with appropriate instructions on the ground that there is no legally established connection at all with what Select Enterprises, Inc. was allegedly doing and the testimony and exhibits, which encompassed the names of Boyd and Joiner, have entirely no significance with the issues of this case (indictment); no showing of where money ultimately going and what for. Moreover, the import of the evidence is guilt by association which by law may not have any probative value. Individuals have dealings independent of those alleged in the indictment with respect to Select."

Consequently, its admission would be inherently prejudicial to the defendant-appellant. Moreover, evidence, even if considered technically relevant, is excludable if it is too slight, remote or conjectural to have any legitimate influence in determining the fact in issue. The question of whether the evidence is of such a nature is a question of law for the court, not the jury. Even if the exhibit is considered proximately relevant, which it is contended is not the case herein, it should have been rejected because its probative value was outweighed by "the danger of unfair prejudice, confusion of the issues, or misleading the jury". See Rules 401 and 403 Federal Rules of Evidence: Weinstein's Evidence, §§ 401(06), 401(08), at pps. 401-29, 30; Richardson, Evidence,

At the close of the evidence in the case, appellant's counsel again moved to strike the exhibit. The record reflects the following motion (A.728):

> "I point out exhibit 296-A. It is a $9,000 check to Joiner which a review of the records clearly shows that from Mr. Joiner's testimony that check was solely in connection with a grant from 40,000 shares of Pig 'n Whistle stock, and there is absolutely no connection with Select or Select Enterprises, and I move that that exhibit be stricken from the evidence."

The prosecution, when asked by the court if the aforesaid was the contention of the Government, could only muster the following statement in support of the position that the court should not strike the exhibit (A.728):

> "The banker from the Kansas town accepted 2000 shares of Select Enterprises as collateral on a loan."

Short perusal of such argument clearly shows an abrasive jump in logic by the prosecution*. However, the

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10th Edition, §147. It long has been accepted that "circumstances which merely raise suspicion or give room for conjecture are not evidence of guilt." Kassin v. United States, 87 F. 2d 183, 184 (5th Cir., 1937). Here, Joiner's very own testimony establishes that the $9,000 check cannot be even conjecturally or speculatively considered evidence of appellant's guilt since the check was with reference to a transaction completely separate and apart from those transactions in issue at the trial with respect to the appellant.

* The position taken by the prosecution that the evidence should not have been stricken from the evidence on the basis

court deemed it sufficient, and the exhibit was not stricken from the evidence*.

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that Select stock was employed with the 40,000 shares of Pig 'N Whistle as collateral for the loan at the Town and Country Business Trust deserves short shrift. The use of Select stock was not shown to be anything other than incidental to the employment of Pig 'N Whistle stock received by the appellant some two months after Select stock was given to Donald Rouse and the appellant. See page 13, supra, note **; A.534-535.

* It is stated in Weinstein's Evidence:

"Nevertheless, the fact that a trial judge's rulings on questions such as relevancy are in large measure insulated from full de novo appellate review is no justification for his being silent as to how he arrived at his decision. Insofar as possible, a trial judge must identify and articulate the circumstances and factors crucial to his ruling so that the appellate court can discern whether or not an arbitrary exercise of judicial power adversely affected rights of the parties. Discretion does not mean immunity from accountability.

* * *

"This is not to say that the judge should be silent as to the factors entering into his rulings. If the question is a serious one he should try to articulate the hypothesis involved, their probative force and the time and prejudice factors. Although it is often stated that relevancy is a matter resting largely within the sound discretion of the trial court, and is not ordinarily reviewable upon appeal, 'the judge who fails to analyze and justify his decisions risks being charged with arbitrariness by the bar, as well as by a reviewing court. More importantly he may deny himself the effective assistance of counsel in reaching a result necessary for a fair trial. Detailed analysis is also a prerequisite for applied Rule 403 because the judge must balance the probative value of the evidence against the dangers specified in that rule to see whether or not the evidence should be admitted....(pps. 401-8, 29, 30).'"

The prosecution's basis for appellant's involvement in the alleged wrongdoings rested on its contention that the $4,000 check to Chapel, the $9,000 check to Joiner and the $25,480 payment of Lewis's note were paybacks into the conspiracy (see pps. 10-16, supra). Inasmuch as Chapel himself negated any weight to such contention with regard to the $4,000.00 check and because the contention with regard to the $25,480 payment of Lewis's note was not anything short of being ludicrous, the thrust of the prosecution's case against Mullenax hinged on the $9,000 check to Joiner. Its importance and subsequent prejudice to the defendant is highlighted and evidenced by the fact that during the course of its rebuttal, the prosecution only referred in substance to the $9,000 check to implicate the defendant in the course

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Joiner was contended to be the promoter of the criminal enterprise with Boyd. The stock certificates given to Rouse and the appellant were in the names of Boyd and Joiner. A wealth of evidence was introduced at trial to show the inherent falsity in value of Select and its stock. The prosecution contended that appellant used Select stock to defraud as a member and part of the criminal conspiracy and enterprise. The thrust of the prosecutor's argument to show appellant's criminal involvement was that he passed money back to the promoters into the criminal enterprise. The $9,000 check was crucial in view of the frivolous assertions in terms of the $4,000 check to Chapel and the $25,480 payment of Lewis's indebtedness to the State National Bank of Alabama. Consequently, its admission by the court and use by the prosecution denied appellant a fair trial.

of the alleged criminal occurrences (A.831). Consequently, the $9,000 check, which from Joiner's very own testimony had no legally sufficient connection with the issues of the trial and was without probative value, should not have been admitted in evidence by the trial court, and the failure of the trial court to strike the exhibit from evidence and from the jury's consideration unequivocally denied the appellant a fair trial.

Additionally, should this Court deem that the exhibit had any semblance of probative value, Rule 403 of the Federal Rules of Evidence requires exclusion of an exhibit when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....". See Rule 403, Federal Rules of Evidence; Weinstein's Evidence, §401(08), pps. 401-29-30; §403(01), pps. 403-18. Resultantly, the failure of the trial court to properly consider the prejudice of the exhibit to the appellant or to charge the jury in the manner requested by defendant Mullenax's supplemental request numbers C, D and particularly E (A.718-721, 725-726) also effectively denied the appellant a fair trial in that the jury from the fact that the check was received in evidence would have been clearly

misled and confused as to its true import.* In Salley v. United States, 353 F. 2d 897, 898 (D.C. Cir., 1965), the court stated:

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* Supplemental request numbers C, D and E were as follows:

(C) "If you find that the defendant Mullenax made any payment of money to any defendant or alleged co-conspirator from the proceeds of the loans obtained with the use of Select Enterprises, Inc's. stock, you cannot find the defendant Mullenax guilty of the charges unless you find that such payments were knowingly and wilfully made pursuant to the alleged scheme to defraud and with the specific intent to defraud on the part of the defendant Mullenax. The requisite mental state is the specific intent to defraud. If the defendant Mullenax's acts were done inadvertently, mistakenly or in good faith without intention to defraud or for other innocent reasons then he must be acquitted of all charges.

In other words, unless you find beyond a reasonable doubt that the defendant Mullenax obtained loans with the use of the stock of Select Enterprises, Inc. with the express purpose of defrauding in violation of the law and with guilty knowledge and specific intent to defraud, you must acquit him of all charges in the indictment.

(D) "In such determination, you may consider whether the statements made by the defendant Mullenax to the financial institutions with respect to Select Enterprises, Inc. and its stock were made in good faith and in the honest belief that they were true. If you find that any untrue representation was made by the defendant Mullenax in good faith or in the belief that it was true; that he had no knowledge that anything material in the financial statement, brochure, news release of Select, or in the pink sheets were untrue -- then he cannot be found guilty of fraud, and he must be acquitted.

(E) "In connection with the charge in count 40 of the indictment, if you find that the defendant Mullenax made a $9,000 payment to Mr. Joiner solely pursuant to the grant

> "Since Levine v. United States, 104 App. D.C. 281, 282, 261 F. 2d 747, 478 (1958), it is clear that despite the trial judge's correct charge that each element must be proved upon a reasonable doubt 'it is reversible error for the court to refuse on request to instruct also as to defendant's theory of the case. This rule *** applies as well to situations where special facts present an evidentiary theory which if believed defeats the factual theory of the prosecution ***.' See also Tatum v. United States, 88 U.S. App. D.C. 386, 391, 190 F. 2d 612, 617 (1951."

See also Bird v. United States, 180 U.S. 356, 361 (1901); Laughlin v. United States, 474 F. 2d 444 (D.C. Cir. 1972); Marson v. United States, 203 F. 2d 904 (6th Cir. 1953).

It is submitted that the aforesaid requests to charge of the defendant-appellant should have been granted by the trial court to clarify the meaning and value of an exhibit, which it is contended should not have been in the first instance received by the trial court in evidence. The requests attempted to have, in addition to other considerations of the defendant-appellant's theory of defense, the matter of the import of the $9,000 check fairly reflected to the jury. A jury needs protection from misleading and

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to him and use of 40,000 shares of Pig 'n Whistle stock which the witness Mann testified was at the time of its use worth $1.50 - $2 a share, which stock was used to obtain a loan from the Town and Country Business Trust, Wichita, Kansas, you cannot consider the $9,000 payment to Mr. Joiner in the determination of your verdict."

prejudicial inferences, and consequently the failure of the trial court to instruct the jury as requested and required, denied appellant a fair trial. The combination that the $9,000 check which from Joiner's own testimony could not have been shown to be connected to either the alleged wrongdoings or to the appellant with reference to the charges set forth against him, in conjunction with its admission into evidence, and the failure of the trial court to properly instruct with reference thereto, unequivccally denied the appellant a fair trial.

POINT IV

THE USE OF SELECT STOCK BY APPELLANT AT THE STATE NATIONAL BANK OF ALAMBAMA, THE HOME STATE BANK AND THE TOWN AND COUNTRY BUSINESS TRUST, WERE NOT ACTS FOR WHICH THE APPELLANT COULD BE CRIMINALLY CHARGED.

THE TRIAL COURT ERRONEOUSLY CHARGED THAT THE USE OF STOCK AS COLLATERAL FOR A LOAN OR ITS USE TO PROVIDE ADDITIONAL SECURITY FOR A LOAN WAS A USE WITHIN THE PURVIEW OF THE SECURITIES LAWS.

The use of the Select stock by appellant was the nexus to appellant's involvement in the prosecution.* Appellant submitted pretrial that the utilization of the stock with reference to the two banks and business trust were not acts for which he could be criminally charged. The pledge of a security with reference to a loan transaction at a bank, or as additional collateral for an outstanding loan at a bank, is not a use falling within the province or boundaries of the securities laws** and does not constitute a crime

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* See Statement of the Case, supra, p. 7.

** Pretrial (A.33, 68), appellant separately contended that the charges against him under 15 U.S.C. §77e should not be countenanced on the additional ground that 15 U.S.C. §77(d) entitled "Exempted Transactions" provides in pertinent part:

"The provisions of Section 77e of this title shall not apply to -- (1) transactions by any person other than an issuer, underwriter or dealer."

thereunder. It was submitted pretrial (A.77-78):

> "Its use as collateral serves a one way purpose: to insure the payment of an otherwise independent obligation.* The holding of the security, for example by a bank, insures that the obligor is disposed to pay the legal obligation. The obligee has recourse in the civil courts for failure of the obligor to pay the debt. The holding of collateral 'pledged' primarily means that the obligee feels that the obligor will have more than moral reason or legal commitment to pay the debt.
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> "Consequently, any alleged use of Select stock in connection with a loan, does not take on the character meant by the legislature in protecting the public in its tradings and dealings in the securities markets, and does not permit charges under the securities laws....".

The thrust of the argument is consistent with the holding of the court in McClure v. First National City Bank of Lubbock, Texas, 497 F. 2d 490 (5th Cir., 1974), cert. denied, 420 U.S. 930. The court in McClure held that the pledge of corporate stock where a bank extended a loan and required corporate stock as additional collateral did not constitute a sale of a security within the meaning of the Securities Exchange Act of 1934. The Court of Appeals stated:

The use of Select stock by appellant was not a use by an "issuer, underwriter or dealer". Appellant at trial was not contended or proven to be of such status. The substantive charges under 15 U.S.C. 77e, independent from the contentions above, should have been dismissed.

* See A.583-584, 596, 681.

> "The securities acts have as their fundamental purpose the protection of investors. To this end they are designed to 'substitute a philosophy of caveat emptor and thus achieve a high standard of business ethics in the securities industry.' ...A commercial bank in accepting a pledge of stock as additional consideration for the extension of an overdue commercial loan does not necessarily affect the securities industry. A commercial bank's business is lending money not trading in securities. Cf. Bronner v. Goldman, 361 F. 2d 759 (1st Cir.), cert. denied, 385 U.S. 933, 87 S. Ct. 295, 17 L. Ed. 2d 214 (1966) (factor selling pledged stock not a 'broker' or 'dealer'). If the bank sells stock pledged as loan collateral, it might than (sic) be subjected to liability in connection with the sale if it does not meet the requirements of the anti-fraud provisions of the securities acts, but mere acceptance of a stock pledge as collateral in a privately negotiated transaction between borrower and lender does not of itself, bring within the scope of the federal securities acts a transaction otherwise outside their purview. See 1 L. Loss, Securities Regulation 649 (2d ed. 1961). (McClure, supra, 497 F. 2d at 495; emphasis added)."

See also United Housing Foundation, Inc. v. Forman, 95 S. Ct. 2051 (1975), infra.

The Select stock was never sold by the State National Bank of Alabama, the Home State Bank* or the Town and Country Business Trust (A.576-577, 618, 661). Moreover, the

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* With reference to the Home State Bank, appellant gratuitously, without any obligation or requirement of the bank, utilized Select stock as additional collateral for an outstanding loan. The pledge of the corporate stock in McClure was required for renewal of the note, and it is emphasized

pledge of stock could not fall within the boundaries of the securities laws inasmuch as there exists a condition precedent (default) prior to the ability of any bank or obligor to utilize stock given as collateral for a loan. The fact that Select stock was used by appellant with reference to loan related transactions does not in and by itself come within the meaning, purview or scope of the securities laws. The transactions in issue in no way realistically touch upon the open securities markets and are not directly attendant to the protection of the public in general. The proposition that the public itself cannot effectively exercise caveat emptor in terms of securities dealings does not manifestly apply to the transactions in issue with "money lending" institutions.

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that the status of appellant's loan at the Home State Bank was not changed because of the use of the Select stock by the appellant. Even though the Home State Bank attempted to have the stock sold, it was unsuccessful in its attempt, and title remained in the appellant and its use by appellant was not within the purview of the securities laws. (See McClure, supra, 497 F. 2d at 496.) Additionally, the court in McClure found the required pledge of the corporate stock outside the realm of the securities laws even though:

> "With the note unpaid, the Bank eventually foreclosed on the corporation's land, its only substantial asset, so that even though not foreclosed, the pledged stock in the corporation became essentially worthless."

Moreover, when the trial court charged the jury in connection with the use of the stock, appellant's counsel took exception to the charge (A.905; see also A.897-898). The trial court charged the jury in pertinent part as follows (A.888):

> "I further instruct you that an offer or sale of a security includes every contract of sale or disposition of the security or of an interest in the scurity (sic) for value. Thus, for example, an offer or sale of the security occurs when a security is sold for money or when it is exchanged for property, such as a fur coat, or when it is pledged to secure a loan from a bank or other lender or when it is pledged to provide further security for an existing loan or debt."*

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* It is interesting that Judge McLean stated in his conclusions and findings in the S.E.C. proceedings which apparently formed the basis of the instant indictment (Securities and Exchange Commission v. Select Enterprises, Inc., et al, 70 Civ. 3795):

> "Segal, it is true, appears to have used a few additional thousand shares for other purposes, such as pledging some for a loan and giving some to a furrier as security for the price of a fur coat. But transactions of that sort do not seem to me to have any real bearing upon the securities laws."

In United Housing Foundation, Inc. v. Forman, supra, the Supreme Court of the United States poignantly stated:

> "We reject at the outset any suggestion that the present transaction, evidenced by the sale of shares called 'stock,' must be considered a security transaction simply because the statutory definition of a security includes the words 'any ... stock.' Rather

Consequently, since the only connection between appellant's loan activities and the onus of the charges stemmed from the use of Select stock with reference to the loan related transactions, appellant's conviction should be reversed and the indictment against him should be dismissed.

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we adhere to the basic principle that has guided all of the Court's decisions in this area:

> "'[I]n searching for the meaning and scope of the word 'security' in the Act[s], form should be disregarded for substance and the emphasis should be on economic reality.' Tcherepnin v. Knight, 389 U.S. 332, 336, 88 S. Ct. 548, 553, 19 L. Ed. 2d 564 (1967). See also Howey, supra, 328 U.S., at 298, 66 S. Ct., at 1102.
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> * * *
>
> "Thus, in construing these acts against the background of their purpose, we are guided by a traditional canon of statutory construction:
>
> > 'that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' Church of the Holy Trinity v. United States, 143 U.S. 457, 459, 12 S. Ct. 511, 512, 36 L. Ed. 226 (1892). See also United States v. American Trucking Assns., Inc., 310 U.S. 534, 543, 60 S. Ct. 1059, 1063, 84 L. Ed. 1345 (1940)(95 S. Ct. at 2058, 2059 emphasis added; footnotes omitted)."

The Supreme Court found that shares of stock which were purchased by residents of a housing cooperative, which stock permitted the resident-purchaser to lease an apartment, were not securities within the purview of the Securities Act of 1933 and Securities Exchange Act of 1934 because the offer, purchase, and use of the stock did not fall under the economic realities of transactions which the securities laws were intended to protect.

POINT V

THE COURT CANNOT COUNTENANCE A GRAND JURY INDICTMENT PREDICATED ON THE PROPOSITION THAT APPELLANT WITHOUT MORE USED SELECT STOCK AT BANKS AS COLLATERAL FOR LOANS.

THE APPELLANT WAS ENTITLED TO HEARINGS AS MANDATED BY THE HIGH COURT IN KASTIGAR V. UNITED STATES, 406 U.S. 441 (1972).

The law affords the Grand Jury proceeding a presumption of propriety, and the courts admittedly are reluctant to offset, interfere or to contravene the presumption that an indictment is found by the Grand Jury on sufficient evidence. See 59 A.L.R. 568. Consequently, the Grand Jury's naming of appellant and others in the instant indictment constitutes a determination by an independent body that substantial evidence exists of sufficient strength "to cause a person of ordinary prudence and caution to conscientously enterain a reasonable belief of the accused's guilt", Coleman v. Burnett, 477 F. 2d 1187, 1202 (D.C. Cir. 1973), and was not an expression of a mere suspicion of possible criminality. However, as is always the case, presumptions, no matter how strong, may be rebutted and appropriate relief granted by a court of law.

Appellant pretrial (A.146), under the authority of

Kastigar v. United States, 406 U.S. 441 (1972), in part moved the trial court for a hearing to determine whether the evidence before the Grand Jury was tainted, for dismissal of the indictment against him, and for such other and further relief as to the court may have seemed just and proper. Appellant also sought, as part of the aforesaid motions, inspection of the Grand Jury minutes in order to effectively challenge the sufficiency of the claimed independent proof at the requested hearing. The motions were denied by the court before trial, but leave was granted to renew them post-trial (A.190-194). After trial, the motions were renewed (A.198) and again denied by the court in its written opinion filed on November 28, 1975 (A.207).

The opinion of Judge Pollack significantly sets forth the following (A.213):

> "The testimony relating to this defendant before the Grand Jury was furnished to the defendant in connection with the pretrial and trial proceedings herein. An in camera inspection of all the Grand Jury minutes conducted by this Court reveals unequivocally that no reference was made to and no direct or derivative use was made of Mullenax's bankruptcy testimony. The Government's affidavits having adequately demonstrated independent, legitimate sources for the documentary evidence submitted to the Grand Jury and for the questioning of Chapel before the Grand Jury, and this evidence being the sum total presented to the Grand Jury (emphasis

> added), there is no need for a Kastigar hearing to explore the possibility of taint and dismissal of the indictment is not required. In addition, Chapel's testimony supplies legitimate and independent evidence sufficient to support the indictment. See United States v. James, 493 F. 2d 323, 326 (2d Cir.), cert. denied, 419 U.S. 894 (1974)."

The Grand Jury minutes were never revealed by the trial court to the appellant, and consequently the nature and extent of the documentary evidence before the Grand Jury is not specifically known. However, because the documentary evidence with reference to the appellant was first made available to him only one or two months prior to trial*, it is submitted that the documentary evidence before the Grand Jury, if any, was not of any persuasiveness and totally consonant with otherwise innocent loan transactions**. In this regard it is pointed out that only Chapel testified before the Grand Jury with reference to the appellant.

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* On appellant's counsel's initial visit to the offices of the United States Attorney for the Southern District of New York with regard to discovery proceedings pursuant to Rule 16 of the Federal Rules of Criminal Procedure, none of the documentary evidence with reference to the loan transactions in issue were disclosed to him. In or about August, 1975, the bank documentary evidence with reference to the two banks and business trust were first revealed to appellant's counsel, and other crucial documentation were only revealed at the eve of trial (See A.118, 142).

** See Statement of the Case, supra, p. 7.

Moreover, Joiner did not reach terms with the prosecution until three weeks before the start of trial (A.821), and certain exhibits - including the $9,000 check, Government's exhibit 296-A - were not received or seen by appellant's counsel until almost the eve of the trial.

Appellant's inclusion in the indictment, therefore, apparently hinged on Chapel's Grand Jury testimony, a copy of which was received by appellant's counsel immediately prior to the time Chapel took the stand at trial in behest of the prosecution. Chapel's testimony - the only testimony against the appellant at the course of the Grand Jury proceedings (A.213) - was as follows (A.200-202):

"Q How about Ernest Mullenax?

A Mullenax, yes, I met him. Of course, I'd known him for years because we are in the same profession. And I did meet him in connection with Select Enterprises. I don't know what his capacity was. I know that he and his associate, Rouse, were also together. And I know they are in the insurance business but I don't know what they were doing with relation to Select Enterprises.

Q You don't know that Mr. Mullenax was given Select Enterprises stock to pledge at banks for loans?

A Oh, I did hear about one he did over in what was it, Georgia or someplace, some southern state.

Q Mr. Boyd told you that, did he not?

A Yes.

"Q Can you tell us, what if anything, Mr. Boyd said in that regard?

A I don't know of anything other than the fact that Mullenax was doing it. At least I don't recall anything other than that.

Q Did Mr. Boyd disclose to you what portion of the proceeds of that loan he hoped to receive from Mullenax?

A No, I don't believe he did.

Q Later did Mr. Boyd confirm to you that Mr. Mullenax had been successful in effecting and placing that loan?

A I believe he did.

Q Do you know today that Mr. Mullenax is no longer in the United States and has gone to Australia?

A No, I didn't.

Q When is the last time you had any contact with Mr. Mullenax?

A I'd say approximately two years ago. He was in Fort Worth and he was living in Oklahoma at the time and I had a cup of coffee with him at the time."

Chapel, in the course of his testimony at the trial, related that statements made prior to trial under oath, including those before the Grand Jury, were perjurious (A.333, 387, 389). Irrespective of this troubling admission, it is strongly contended that his testimony as a matter of law could not be countenanced by this Court to be a constitutionally firm basis for appellant's inclusion in the indictment. Consequently, appellant's conviction and the

indictment against him should be dismissed. An indictment only may be returned against an accused upon a Grand Jury's finding that the "evidence" constituted the existence of probable cause to believe the accused participated in criminal activity. The High Court in Brinegar v. United States, 338 U.S. 160, 176 (1949) stated:

> "The rule of probable cause is a practical, non-techical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."

A grand jury indictment should not rest on mere suspicion. Sufficient evidence to indict exists "...when there is competent evidence, direct or circumstantial, before (the Grand Jury) which leads (them), as reasonable persons, to believe that the defendant is guilty as charged", Yanowich, Charge to the Grand Jury, 16 F.R.D. 93, 94 (1955). See also Chief Justice Roger B. Taney, Charge to Grand Jury, 30 Fed. Cases 998, 999 (No. 18, 257) (C.C.D. Md. 1836). Blackstone poignantly stated in this regard (4 Blackstone's Commentaries 303):

> "A Grand Jury...ought to be thoroughly persuaded of the truth of an indictment, so far as the evidence goes, and not to rest satisfied merely with remote probabilities."

It is anticipated that the Government will rely on Costello v. United States, 350 U.S. 359 (1956); however, it is urgently claimed that such reliance would be misplaced. Petitioner in Costello claimed that a Grand Jury indictment founded on hearsay evidence and subsequent conviction thereon could not be sustained. The High Court rejected petitioner's claim, but as Mr. Justice Burton stated in his concurring opinion:

> "I assume that this Court would not preclude an examination of grand jury action to ascertain the existence of bias or prejudice in an indictment. Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizens (350 U.S. at 364; emphasis supplied)."

The dictum of the High Court in Costello gave the Grand Jury founded indictment enormous immunity from legal attack; in essence, from all situations except where the indictment is infirm on its face. Such dictum was based on the premise that the grand jury's judgment should not be tampered with or revised because "(i)ts adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an

instrument of justice." Unfortunately, such contention, probably because of the particular facts of the case in Costello*, omits a distinction essential to afford the

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* The facts and question here to not centrally involve hearsay evidence. It is submitted that careful inspection of Chapel's Grand Jury testimony shows that such testimony is not rationally persuasive of the crimes charged against appellant or provided a basis for the indictment against him. Additionally, as submitted in Point IV, supra, the use of Select stock by appellant were not acts for which he could be criminally charged. The situation here is distinguishable from Costello. As Judge Burton stated in his concurring opinion in Costello (350 U.S. at 364, 365):

> "Here (in Costello) as in Holt v. United States, 218 U.S. 245, 31 S. Ct. 2, 54 L. Ed. 1021, substantial and rationally persuasive evidence apparently was presented to the grand jury. We may fairly assume that the evidence before that jury included much of the testimony later given at the trial by the three government agents who said that they had testified before the grand jury. At the trial, they summarized the financial transactions of the accused about which they were not qualified to testify of their own knowledge. To use Justice Holmes' phrase in the Holt case, such testimony, standing above, was 'incompetent by circumstances', 218 U.S. supra, at page 248, 31 S. Ct. at page 4, supra, and yet it was rationally persuasive of the crime charged and provided a basis for the indictment. At the trial, with preliminary testimony laying the foundation for it, the same testimony constituted an important part of the competent evidence upon which the conviction was obtained."

This was not so in the case at bar. Moreover, the question clings as to whether any portion of Chapel's testimony was perjurious.

appellant and all accused persons rudimentary Fifth Amendment considerations: that the grand jury's esteem as an instrument of justice stems from its intended purpose "to afford a safeguard against oppressive actions of the prosecutor or a court." United States v. Cox, 342 F. 2d 167, 170 (5th Cir., 1965) cert. denied, sub nom Cox v. Haubert, 381 U.S. 935. The Fifth Amendment's command that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury" interposed the Grand Jury to protect from oppressive and unfounded accusations. Although, on one hand, it was the strict intention of the framers of the Fifth Amendment provisions to prohibit all capital or infamous charges except those founded by Grand Jury, it was not, on the other hand, the intention - as enunciated by the Due Process clause of the Fifth Amendment - that an indictment founded by Grand Jury action could not be quashed or vacated because of legally related constitutional infirmities. This is the important distinction. Consequently, as Mr. Justice Burton stated (350 U.S. at 365):

> "I agree with Judge Learned Hand that 'if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated.' 2 Cir., 221 F. 2d 668, 677."

Additionally, the trial court's post-trial written decision (A.207-215) that there was no need for Kastigar hearings, was openly contrary to the mandate of the High Court in Kastigar v. United States, supra*. The Court in Kastigar, supra, 406 U.S. at 461, 462, made it crystal clear that:

> "One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources."

Consequently, the trial court was incorrect and in error in holding Kastigar hearings were unnecessary because 1) "there was no possibility of a taint from the evidence before the Grand Jury (A.213)" and 2) "(d)efendant has not pointed to and this Court cannot find any part of this evidence which might not have been derived from the independent and legitimate sources described in the government affidavits (A.215)."

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* All pretrial and post-trial proceedings with reference to defendant-appellant's motions for inspection of the Grand Jury minutes, Kastigar hearings and dismissal of the indictment can be found at A.146-215.

The trial court in its reasoning strays away from the underlying point in Kastigar which is that the immunity with which the defendant-appellant was vested

> "...prohibits the prosecutional authorities from using compelled testimony in any respect and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

The trial judge in his written opinion significantly set forth (A.209):

> "On January 5, 1971, pursuant to his voluntary petition in bankruptcy, the defendant testified before the first meeting of creditors. His testimony touched on transactions which were before the Grand Jury that returned the indictment. In his bankruptcy testimony the defendant mentioned at least one person who was also called as a witness at the trial of this action. In addition, the financial institutions involved in the above described loan transactions apparently took part in this bankruptcy proceeding (emphasis supplied)."

The opinion, moreover, established that 11 U.S.C. §25(a)(10)* clearly covered "such testimony as was given by defendant Mullenax" (A.209).

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* 11 U.S.C. §25(a)(10) sets forth in pertinent part as follows:

> "... no(bankruptcy) testimony, or any evidence which is directly or indirectly derived from such testimony, given by him (the bankrupt) shall be offered in evidence against him in any criminal proceeding...."

Resultantly, the heavy burden of proving that the evidence used at the Grand Jury and at trial was free of taint shifted to the prosecution. Kastigar hearings were mandated; their denial was in contravertion of defendant-appellant's Fifth Amendment rights*.

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* See Point IV in Kastigar, supra, 406 U.S. at 459.

On or about August 22, 1975, appellant's counsel received a letter from Howard A. Sussman, Esq., one of the assistant United States attorneys involved in the prosecution, which stated in pertinent part (A.163):

> "Neither material contained in Referee Morton's findings and conclusions, nor that in the notes mentioned above (notes of appellant's testimony in the bankruptcy proceedings), is in any instance new to us, and we hereby represent that all the evidence to be used against Mr. Mullenax in the trial of this case comes from sources independent of those notes, findings and conclusions and is in no instance derived from them in any manner."

W. Cullen MacDonald, Esq., the other assistant United States Attorney, who was in charge of the prosecution, thereafter in an affidavit dated September 24, 1975, established that he was "the assistant United States attorney who presented this case to the Grand Jury", and that "we are possessed (of a copy of Mullenax's bankruptcy testimony) but which we have never read." Consequently, the trial court in denying Kastigar hearings left the following related issues open:

> 1) Even though not sufficient to negate the necessity of Kastigar hearings, Mr. MacDonald nor Mr. Sussman proffered the representation that all the evidence used against appellant in the presentation of the case to the Grand Jury finding the instant indictment came from legitimate

independent sources. Such representation was made with regard to the evidence to be used at trial (A.163).

2) Even though the trial judge stated that Mr. MacDonald's affidavit evidenced that "no government attorney read or made use of that (Mullenax's bankruptcy) testimony (A.210)", appellant was not afforded the opportunity to discover why the full transcript of Mullenax's bankruptcy testimony, possession of which by the Government was first revealed in Mr. MacDonald's affidavit, was in the prosecution's hands in the first instance, and when and from whom it was received. Moreover, appellant was not afforded the right to discover whether Referee Morton's findings and conclusions dated and filed June 29, 1973, which make reference to appellant's bankruptcy testimony, was used in connection with the Grand Jury proceeding.

POINT VI

THE PROSECUTION FAILED TO ESTABLISH THE GUILT OF THE DEFENDANT-APPELLANT BEYOND A REASONABLE DOUBT.

In view of all the foregoing, it is submitted that the prosecution failed to prove the guilt of the defendant-appellant on the ground that the record at trial was barren of legally sufficient proof to evidence the requisite intent of the defendant-appellant to show his purported membership in the alleged criminal conspiracy, or his purported engagement in any artifices or schemes to defraud as alleged against him by the indictment.

The prosecution's attempt to prove intent, at best, was based on circumstantial evidence. It is submitted that reasonable minds, as a matter of law and as a matter of rudimentary fairness, could not conclude that the evidence at trial was inconsistent with the hypothesis of defendant-appellant's innocence, and that this Court should not, on the nature, quality, character, extent and sufficiency of the evidence, sustain or countenance the jury's finding of guilt "beyond a reasonable doubt". See United States v. Freeman, 498 F. 2d 569 (2d Cir., 1974); United States v. Black, 497 F. 2d 1039 (5th Cir., 1974).

This Court in United States v. Freeman, supra, stated that

> "...the test to be applied in reviewing the sufficiency of the evidence after a bench trial is the same as the one we have since adopted, United States v. Taylor, 464 F. 2d 240 (2 Cir. 1972), overruling the Costello and Tutino line of cases, when the issue is the propriety of submission to a jury. Adapting Judge Prettyman's formulation in Curley v. United States, 81 U.S. App. D.C. 389, 160 F. 2d 229, 232-233 (D.C. Cir. 1947), cert. denied, 331 U.S. 837, 67 S. Ct. 1511, 91 L. F. 2d 1850 (1947), with respect to jury trials, which we endorsed in Taylor, the test here is whether upon the evidence, giving full play to the right of the trial judge to determine credibility, weigh the evidence, and draw justifiable inferences of fact, 'a reasonable mind might fairly conclude guilt beyond a reasonable doubt.' This does not alter the principle that after a conviction we consider the evidence 'in the view most favorable to the government'; it simply raises the level that the evidence so considered must meet (498 F. 2d at 571)."

The trial judge, it is respectfully asserted, should not have submitted defendant-appellant's case, in the first instance, to the jury.

CONCLUSION

The judgment of conviction should be reversed and the indictment dismissed or, in the alternative, remanded for a new trial and hearings mandated by Kastigar v. United States, 406 U.S. 441 (1972).

Respectfully submitted,

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